Tan Khing Hung v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 41-05-95-II
ABDUL KADIR SULAIMAN J
7 DECEMBER 1995

Criminal Procedure *— Forfeiture — Publicly exhibiting obscene laser disc film — Whether magistrate correct in ordering forfeiture of equipment used under s 407(2) rather than s 411 of the Criminal Procedure Code (FMS Cap 6) — Whether inquiry should have been held — Whether owner should be given right to be heard — Criminal Procedure Code (FMS Cap 6) ss 407(2) & 411*

The appellant was charged under s 292(a) of the Penal Code (FMS Cap 45) ('the Penal Code') for publicly exhibiting an obscene laser disc film. He pleaded guilty to the charge. The prosecution tendered exhs P2–P12 which the appellant admitted were used in the commission of the offence. The magistrate accepted the plea of guilty and convicted the appellant on the charge. He fined the appellant the sum of RM2,000, in default 2 months' imprisonment. In exercise of his powers under s 407(2) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), he ordered exhs P2–P8 and P10 which was equipment used in exhibiting the film to be forfeited and to be retained by the police for disposal, on the ground that all those exhibits were used for the commission of the offence. This appeal was against the order of forfeiture of exhs P2–P8 and P10. The first ground of appeal was that the order made against the exhibits ought to be in accordance with s 411 of the CPC and not under s 407(2) thereof as the offence committed by the appellant was one under s 292 of the Penal Code. The second ground of appeal concerned the legality of the order as the owner of the things forfeited was not given the right of being heard before the order was made.

Held, dismissing the appeal and affirming the sentence and the order of forfeiture made by the magistrate:

(1) Exhibits P2–P8 and P10 were not copies of the obscene laser disc in respect of which the conviction was made and therefore s 411 of the CPC would not apply in respect of them. The power of the court under s 407(2) of the CPC to, inter alia, forfeit property which has been used for the commission of any offence shall be exercised subject to any special provisions relating to forfeiture, confiscation, destruction or delivery contained in the written law under which the conviction was had. There are, however, no special provisions in the Penal Code relating to forfeiture, confiscation, destruction or delivery of exhibits which would require the magistrate to pay attention to before making the order he made in this case. In the circumstances, the magistrate was right in invoking s 407(2) of the CPC in dealing with the exhibits, particularly exhs P2–P8 and P10 (see pp 320H–I, 321B–C, G).

(2) The court has to act under s 407(2) of the CPC to release the property to its true owner if satisfied that the offence has been committed without his consent, knowledge and connivance. Only if there were before the magistrate evidence of the true owner would it be incumbent upon him to hold an inquiry to ascertain the right of the true owner over the exhibits before making the order of forfeiture. However, in the present case there was only the information that the exhibits were on loan and no particulars of the true legal owner or his identity or his possible rights or interest in the exhibits were given. As such information was lacking, the magistrate was right in the exercise of his discretion under s 407(2) of the CPC without first holding the requisite inquiry (see pp 322H–I, 323A–B; *Chung Khiaw Bank Ltd v PP* [1968] 2 MLJ 196 followed).

[Bahasa Malaysia summary

Perayu dipertuduh di bawah s 292(a) Kanun Keseksaan (NMB Bab 6) ('Kanun itu') kerana mempamerkan secara awam sebuah filem cakera laser yang lucah. Dia mengaku bersalah terhadap pertuduhan itu. Pendakwaan mengemukakan kepada mahkamah barang kes P2–P12 yang diakui oleh perayu telah digunakan untuk melakukan kesalahan itu. Majistret menerima pengakuan bersalah itu dan menyabitkan perayu di atas pertuduhan itu. Perayu didenda sebanyak RM2,000, jika ingkar dua bulan penjara. Dalam menggunakan kuasanya di bawah s 407(2) Kanun Acara Jenayah (NMB Bab 6) ('KAJ'), majistret memerintahkan supaya barang kes P2–P8 dan P10 yang merupakan alat-alat yang digunakan untuk mempamerkan filem itu dilucut hak dan disimpan oleh pihak polis untuk dihapuskan, atas alasan bahawa semua barang kes tersebut telah digunakan untuk melakukan kesalahan itu. Rayuan ini adalah terhadap perintah perlucuthakan ke atas barang kes P2–P8 dan P10. Alasan rayuan yang pertama adalah bahawa perintah yang dibuat terhadap barang kes itu sepatutnya dibuat di bawah s 411 KAJ dan bukan di bawah s 407(2) KAJ kerana kesalahan yang dilakukan oleh perayu itu adalah satu kesalahan di bawah s 292 Kanun itu. Alasan rayuan yang kedua adalah mengenai kesahan perintah itu kerana pemunya barang yang dilucut hak itu tidak diberi hak untuk didengar sebelum perintah itu dibuat.

Diputuskan, menolak rayuan itu dan mengesahkan hukuman dan perintah perlucuthakan yang dibuat oleh majistret itu:

(1) Barang kes P2–P8 dan P10 bukanlah salinan cakera laser lucah yang berkenaan dengannya sabitan dibuat dan oleh itu s 411 KAJ tidak terpakai bersangkutan dengannya. Kuasa mahkamah di bawah s 407(2) KAJ untuk, antara lainnya, melucut hak barangan yang telah digunakan untuk melakukan sebarang kesalahan harus digunakan tertakluk kepada mana-mana peruntukan khas berkenaan dengan perlucuthakan, perampasan,

pemusnahan atau penghantar-serahan yang terkandung di dalam undang-undang bertulis di bawah mana sabitan itu dijalankan. Walau bagaimanapun, tidak terdapat peruntukan khas dalam Kanun itu berkaitan dengan pelucuthakan, perampasan, pemusnahan atau penghantar-serahan barang kes yang mengkehendaki majistret memberikan perhatiannya sebelum membuat perintah seperti yang telah dibuat di dalam kes ini. Dalam keadaan yang demikian, majistret betul dalam menggunakan s 407(2) KAJ ketika menguruskan hal barang kes itu, terutamanya barang kes P2–P8 dan P10 (lihat ms 320H–I, 321B–C, G).

(2) Mahkamah mesti bertindak di bawah s 407(2) KAJ untuk melepaskan barangan itu kepada pemunya sebenarnya jika berpuas hati bahawa kesalahan itu telah dilakukan tanpa kebenaran, pengetahuan atau persubahatannya. Hanya jika terdapat di hadapan majistret keterangan mengenai pemunya sebenar, barulah wajib bagi beliau mengadakan siasatan untuk menentukan hak pemunya yang sebenar ke atas barang kes itu sebelum membuat perintah perlucuthakan. Walau bagaimanapun, di sini hanya terdapat maklumat bahawa barang kes itu telah dipinjam dan tiada butiran tentang pemunya sebenar yang sah atau identitinya atau hak atau kepentingannya yang mungkin ke atas barang kes itu diberi. Oleh kerana maklumat sebegitu tidak terdapat dalam kes ini, majistret betul dalam menggunakan budi bicaranya di bawah s 407(2) KAJ tanpa terlebih dahulu membuat siasatan yang dikehendaki (lihat ms 322H–I, 323A–B; *Chung Khiaw Bank Ltd v PP* [1968] 2 MLJ 196 diikut).

Notes

For cases on exhibits, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1203–1222.

Case referred to

Chung Khiaw Bank Ltd v PP [1968] 2 MLJ 196

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 407(2), 411
Fisheries Act 1985 s 34
Customs Act 1967 s 127(1)
Penal Code (FMS Cap 45) s 292(a)
Road Traffic Ordinance 1958 s 92(4)

Anthony Phua (*Loke, King & Co*) for the appellant.
Zulkarnain Hussain (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: The appellant was charged before the learned

magistrate as follows:

> That you, on 30 October 1994 at about 2015 hrs, at Cat City Laser Mini Theatre, Jalan Canna, Kuching, in the state of Sarawak did exhibit publicly an obscene laser disc film entitled 'Hong Kong Four Beautiful Women' and you thereby committed an offence publishable under s 292(a) of the Penal Code (FMS Cap 45).

He pleaded guilty to the charge and admitted to the brief facts tendered. According to the record of appeal, the following exhibits were tendered by the prosecution which the appellant admitted as being used in the commission of the offence:

P2: one projector 'Sanyo';
P3: one amplifier 'Peavey';
P4: one 'Pioneer' laser disc player;
P5: one 'Toshiba' laser disc player;
P6: one equalizer 'Peavey';
P7: one home-made remote control;
P8: two loud speakers 'Peavey';
P9: three laser discs:
'Joshua Tree';
'Beyond Taboo'; and
'Hong Kong Four Beautiful Women';
P10: one car alarm key used to manipulate laser disc player with three keys;
P11: two ticket booklets with 'Cat City Laser Mini Theatre'; and
P12: four used tickets, taken from four witnesses who were watching the blue film.

The learned magistrate accepted the plea of guilty and convicted the appellant on the charge. He fined the appellant the sum of RM2,000 in default 2 months' imprisonment. In exercise of his powers under s 407(2) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), he ordered exhs P2–P8 and P10 to be forfeited and to be retained by the police for disposal, on the ground that all those exhibits were used for the commission of the offence. He ordered exhs P9, P11 and P12 to be destroyed by the court. This appeal by the appellant is against the order of forfeiture of exhs P2–P8 and P10 only.

The first ground of appeal is that the order made against the said exhibits ought to be in accordance with s 411 of the CPC and not under s 407(2) thereof as the offence committed by the appellant is one under s 292 of the Penal Code (FMS Cap 45) ('the Penal Code'). The second ground of appeal concerns the legality of the order as the owner of the things forfeited was not given the right of being heard before the order was made.

I will now deal with the first ground of appeal. The issue is whether the learned magistrate was correct in invoking s 407(2) of the CPC when exercising his discretion over the forfeiture of the exhibits, instead of applying s 411 thereof when the offence committed by the appellant is one

under s 292 of the Penal Code. Section 407(2) of the CPC states as follows: A

> (2) During or at the conclusion of any inquiry or trial in any criminal court the court may make such order as it thinks fit for the custody or disposal of any property or document whatsoever produced before it or in its custody or the custody of the police or of any public servant *regarding which any offence appears to have been committed or which has been used for the commission of any offence.* B
>
> The power herein conferred upon the court shall include the power to make an order for the forfeiture or confiscation or for the destruction or for the delivery to any person of such property, but shall be exercised *subject to any special provisions relating to forfeiture, confiscation, destruction or delivery contained in the written law under which the conviction was had.* C
> (Emphasis added.)

Section 411(1) of the CPC states as follows:

> (1) *On a conviction under s 292*, s 293, s 501 or s 502 of the Penal Code the court may order the destruction of *all the copies of the thing in respect of which the conviction was had* and which are in the custody of the court or remain in the possession or power of the person convicted. (Emphasis added.) D

It is not in dispute that s 407 of the CPC is a general provisions and s 411 thereof is specific. The latter relates only to destruction of *all copies* of *the thing* in respect of which the conviction was had under the specific sections of the Penal Code mentioned therein. It is not concerned with *the thing* itself. Confining ourselves to a conviction under s 292 of the Penal Code, of which the appellant was convicted on his own plea of guilty, the power given to the court by this subsection only extends to the order for the destruction of all copies of the obscene laser disc film entitled 'Hong Kong Four Beautiful Women' (one of the exhibits in P9) which are in the custody of the court or remain in the possession or power of the appellant. However in this case, no such order was made by the learned magistrate at all. All he did was to order the disc itself (one of the exhibits in P9) which was the exhibit in the case, to be destroyed by the court. But he did it in pursuance of the power given to him under s 407 of the CPC. As regards exhs P2–P8 and P10 which are the subject matter of the appeal, they are not copies of the thing in respect of which the conviction was had and in the circumstances, s 411 of the CPC would not apply in respect of them. Section 407(2) of the CPC empowers the court to make an order for the forfeiture or confiscation or for the destruction or for the delivery to any person of any property produced before it or in the custody of the court, the police or any public servant regarding which any offence appears to have been committed or which has been used for the commission of any offence. However, a limit is imposed by the said subsection on this power of the court. It shall be exercised only subject to any special provisions relating to forfeiture, confiscation, destruction or delivery contained in the written law under which the conviction was had. The conviction in this case was had under s 292 of the Penal Code. So, the written law to look

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at is the Penal Code. Is there any special provisions in the Penal Code relating to forfeiture, confiscation, destruction or delivery of those exhibits, particularly exhs P2–P8 and P10, as so made by the learned magistrate? As mentioned earlier, s 411 of the CPC does not concern itself with the said exhibits, not being copies of them. I am afraid I cannot find anywhere in the Penal Code of other special provisions which relates to the forfeiture, confiscation, destruction or delivery of those exhibits which would require the learned magistrate to pay attention to before making the order he made in this case. An example where a special provision is contained in the written law under which a conviction was had is s 34 of the Fisheries Act 1985 which contains the following provisions:

> When it is proved to the satisfaction of a court that any vessel, vehicle, article or thing seized under this Act was the subject matter of, or was used in the commission of, an offence under this Act, the court may order the forfeiture of such vessel, vehicle, article or thing notwithstanding that no person may have been found guilty of such offence.

Another example yet of the special provisions contained in a written law is s 127(1) of the Customs Act 1967 which provides:

> An order for the forfeiture or for the release of anything liable to forfeiture under this Act shall be made by the court before which the prosecution with regard thereto has been held, and an order for the forfeiture of goods shall be made if it is proved to the satisfaction of the court that an offence against this Act or any regulation made thereunder has been committed and that the goods were the subject matter of or were used in the commission of the offence notwithstanding that no person may have been convicted of such offence.

It is in those sort of situations where the proviso to s 407(2) of the CPC would apply. In a conviction under either of the two Acts mentioned in the examples, the power of the court is not to be governed by s 407(2) of the CPC but is to be subject to the special provisions provided in the two Acts. However, in this case, the Penal Code does not have those special provisions in it and as stated earlier, s 411 of the CPC itself does not apply to the various exhibits before the learned magistrate. In the circumstances, the learned magistrate was right in invoking s 407(2) of the CPC in dealing with the exhibits, particularly exhs P2–P8 and P10.

Now, I come to deal with the second ground of appeal. It is contended that the learned magistrate erred in fact and in law when he made the order for disposal of the exhibits without giving the owner the right to be heard even though the learned magistrate was informed that the exhibits were still on loan and that the appellant was only a worker.

According to the record of appeal, in his mitigating plea, the appellant stated that he was not the towkay but only a worker. His towkay was charged in another court. He further stated that all the equipment were still on loan and asked the court not to forfeit them but to return to him. However, in his order, the learned magistrate ordered that exhs P2–P8 and P10 be forfeited and they be retained by police for disposal, as all were used in the commission of the offence. As regards exhs P9, P11 and P12

(which are not the subject matter of appeal), he ordered that they be destroyed by court. The appellant was convicted for exhibiting publicly an obscene laser disc film entitled 'Hong Kong Four Beautiful Women', an offence under s 292 of the Penal Code. Based on the evidence and rightly conceded by learned counsel for the appellant, the appellant was rightly convicted by the learned magistrate on his own plea of guilty for an offence under the section, being a person who publicly exhibited the obscene laser disc. Under s 407(2) of the CPC, the learned magistrate has the power to make an order of forfeiture of exhs P2–P8 and P10 which according to the learned magistrate in his grounds of decision at p 7 of the appeal record were essential, since the obscene laser disc could not be of use without the assistance of those exhibits. By itself, it is only a shiny disc. The exhibits were, therefore vital and a necessary adjunct to the exhibiting of the film to commit this offence. The learned magistrate, however, did not hold any inquiry before making the order. The question, therefore, is whether the learned magistrate had exceeded his power in so ordering without giving the right to the owner of those exhibits the right of being heard? To my mind, it depends very much on whether the owner is known or indeed exists. The appellant before the learned magistrate merely said that those exhibits were still on loan and nothing more. No detail of the owner was given. In *Chung Khiaw Bank Ltd v PP* [1968] 2 MLJ 196, one of the questions referred to the then Federal Court for its determination is whether the true legal owner of the vehicle has a right to be heard before any order for forfeiture of the vehicle under a hire purchase agreement may be made. The court there was dealing with the power of the court under s 92(4) of the Road Traffic Ordinance 1958 ('the Ordinance') where the power to forfeit any vehicle seized under the Ordinance is discretionary. At p 199, MacIntyre FJ said that an order made under the provisions of s 407 of the CPC is a judicial order and could be made only in accordance with the legal processes by which any court arrives at a decision. The court has to act under s 407(2) to release the property to *the true owner* if satisfied that the offence has been committed without his consent, knowledge and connivance. At p 200, the learned FCJ said:

> That section (s 407(2) of the CPC) empowers the court to order the delivery of the property seized to 'any person' and we must presume that the expression 'any person' is wide enough to embrace the true legal owner of a vehicle having regard to the dictum of the Privy Council in *Sajan Singh v Sadara Ali* [1960] MLJ 52, on the question of registration of a motor vehicle as evidence of ownership that: 'The registration book is not in Malaya, any more than it is in England, a document of title'.

Now, applying that principle to our present case, if only there is before the learned magistrate evidence of the true owner, then it is incumbent upon him to hold an inquiry to ascertain the right of the true owner over the exhibits before making the order of forfeiture. However, what was before him was the information that the exhibits were on loan. No particulars of the true legal owner or his identity or his possible rights and interest in the exhibits were given. If on such bare statement of the appellant the court is obliged to hold an inquiry before the exercise by it of the discretion given

by s 407(2) of the CPC then in every case of the exercise of such a discretion without holding such an inquiry, such an exercise would be a bad exercise of the power. Such a bare statement without more could be easily raised in every case of a similar nature as this one before the court. To demand for an inquiry to determine the rights of the true owner, there must be before the court sufficient information of the existence of the true legal owner and of his possible rights and interest in the subject matter. As such information is lacking in the present case, I am of the view that the learned magistrate was right in the exercise of his discretion under s 407(2) of the CPC without first holding the requisite inquiry.

In the circumstances, I find no merits in the two grounds of appeal. In his submission, learned counsel says that it was not established as to which of the exhibits were used in the commission of the offence. But from the record of appeal, it is disclosed that the appellant admitted that all the relevant exhibits were used in the commission of the offence. During the hearing of this appeal, I examined the said exhibits and I am satisfied that in order to commit this offence based on the brief facts of the case given, all exhs P2–P8 and P10 are necessary and in fact used in the commission of the offence as so admitted by the appellant. P4 and P5 are two laser disc players. In the light of the admission by the appellant, one of them must have been used to operate the offensive discs with the title 'Hong Kong Four Beautiful Women' just before the raid and the other one was on a standby with the non-offensive disc containing an ordinary English film entitled 'Joshua Tree' which was substituted upon seeing the raiding parties with the aid of P7 and P10. Exhibit P2 was necessary to project the images brought about by P4 and P5 to the wall or screen. Exhibits P3, P6 and P8 are instruments necessary to produce the audio in respect of the images projected. Therefore, it is true as admitted by the appellant that all the relevant exhibits were used in the commission of the offence. Such being the position, it is, therefore, within the discretion of the learned magistrate under s 407(2) of the CPC to forfeit.

Lastly, the appellant also requests me to exercise my discretionary power of revision. However, having considered the evidence as in the record of appeal and the submissions made by both parties, I am satisfied that the learned magistrate was right in the exercise of his powers under the law pursuant to s 407(2) of the CPC and, therefore, there is nothing for me to revise. I, therefore, dismiss the appeal of the appellant and affirm the sentence and the order made by the learned magistrate.

Appeal dismissed.

Reported by Mariette Peters-Goh